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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 911

NANTAHALA POWER AND LIGHT COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 384 F. 2d 200. The declaratory order of the Commission (Pet. App. C., 1c–14c) is reported at 36 FPC 119. The Commission's order denying rehearing (Pet. App. C, 15c) is reported at 36 FPC 581.

JURISDICTION

The judgment of the court of appeals was entered on September 14, 1967, and the petition for certiorari was filed on December 13, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power Act, 16 U.S.C. 825*l*(b).

287-974—68

QUESTIONS PRESENTED

1. Whether the Federal Power Commission is foreclosed from requiring petitioner to obtain licenses for the continued operation and maintenance of hydroelectric projects which generate electric power transmitted in interstate commerce by the Commission's findings, made prior to this Court's decision in *Federal Power Commission* v. *Union Electric Co.*, 381 U.S. 90, that construction of the projects would not affect interstate commerce.

2. Whether the court below correctly held that petitioner's challenge to the constitutionality of the net-investment recapture provision of Section 14 of the Federal Power Act was not ripe for decision.

STATUTE INVOLVED

The relevant provisions of the Federal Power Act (49 Stat. 838, 863, 16 U.S.C. 791a *et seq.*) are set forth in Appendix B to the petition.

STATEMENT

Petitioner operates seven unlicensed hydroelectric projects constructed between 1941 and 1955 on nonnavigable headwaters of the Little Tennessee River in western North Carolina. The projects are interconnected with the Tennessee Valley Authority system, and some of their output is transmitted in interstate commerce. Prior to the construction of these projects, petitioner filed declarations of intention with the Commission, pursuant to Section 23(b) of the Federal Power Act (49 Stat. 838(b), 16 U.S.C. 817). The Commission approved the construction of the proj-

ects without licenses on the basis of its findings that the construction would not affect interstate commerce. At the time these findings were made, the phrase "interests of interstate or foreign commerce," as used in Section 23(b), was widely interpreted as referring only to navigation and water commerce (Pet. App. 1c–4c).

In May 1965, this Court held in *Federal Power Commission* v. *Union Electric Co.*, 381 U.S. 90 ("Taum Sauk"), that projects to and from which electric power flowed in interstate commerce thereby had effects on interstate commerce and were required to be licensed. Thereafter the Commission advised petitioner and others similarly affected by *Taum Sauk* that licenses might be required for their projects. Petitioner then applied to the Commission for a declaratory order that no licenses were required for its projects. Petitioner argued that the Commission's findings in its earlier orders estopped it from now requiring that the projects be licensed, and that to subject the projects to the risk of recapture by the United States at net investment, as required by Section 14 of the Act (16 U.S.C. 807), would violate the Fifth Amendment of the United States Constitution. The Commission held that licenses were required because of the projects' effects on commerce in electricity and ordered petitioner to apply for licenses [1] (Pet. App. C, 1c–14c). The court of appeals affirmed, rejecting peti-

[1] The Commission did not find it necessary to consider the constitutional question raised here, and rejected a contention (not renewed in this Court) that an operating agreement with the Tennessee Valley Authority served to exempt petitioner from licensing jurisdiction.

tioner's interpretation of the licensing requirements of the Act and holding the Fifth Amendment question not ripe for decision (Pet. App. A).

ARGUMENT

1. Petitioner does not deny that under the standards enunciated in *Federal Power Commission* v. *Union Electric Co.*, 381 U.S. 90, its projects affect interstate commerce and therefore would normally be subject to license under Section 4(e) and 23(b) of the Federal Power Act (16 U.S.C. 797(e), 817). It contends, however, that because the Commission found, at the time the declarations of intention were filed, that the construction of the projects would not affect interstate commerce, the Commission may not subsequently require petitioner to secure licenses for the continued maintenance and operation of the projects, even though these activities clearly affect interstate commerce. The Congressional intention, petitioner argues, in requiring the Commission to determine whether proposed construction would affect interstate commerce was to encourage private investment in hydroelectric developments by providing a means whereby investors could obtain a conclusive determination whether the project would be subject to regulation by the Commission.

The court below correctly held that the result urged by petitioner is inconsistent with both the plain meaning and the objectives of the Federal Power Act. When the Commission finds that the construction of a proposed hydroelectric project would affect interstate commerce, Section 23(b) prohibits the *construction, maintenance, or operation* of the project without

a license. The last sentence of Section 23(b), relied upon by petitioner, permits only *construction* without a license when the Commission finds that the construction will not affect interstate commerce; it does not preclude the Commission from subsequently requiring a license, under Section 4(e), for the maintenance and operation of a project. The court below concluded that the Commission's original negative findings granted petitioner only the right to construct the projects and to maintain and operate them without a license, so long as such operation did not affect interstate commerce.

This Court has consistently held that the Federal Power Act was intended to secure a comprehensive development of the nation's water-power resources through effective federal regulation. *Federal Power Commission* v. *Union Electric Co.*, 381 U.S. 90, 99–101; *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, 328 U.S. 152, 180–181. Petitioner's position is, in effect, that authorization to construct a project without a license constitutes a perpetual grant of immunity from any requirement to obtain a license for operation and maintenance of the project; or, put another way, that the national interest in regulating a hydroelectric project must be determined at the time of its proposed construction and that, once a negative finding is made, it is not material whether subsequent factual developments or judicial interpretations of the statute indicate that the operation of the project affects interstate commerce.[2]

[2] It is unclear from the Petition whether Nantahala concedes, as it apparently did in the court below (Pet. App. 22a–23a),

In *Union Electric,* however, this Court found, on the basis of the Act's history, that Congress intended the Commission's regulatory powers to be coextensive with the full scope of federal authority under the commerce clause. Nothing in that history suggests that Congress intended to sacrifice the public interest in regulating the operation of a project that affects commerce in favor of protecting investors' reliance on the Commission's initial finding.[3] As the court below stated:

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that it may properly be required to obtain licenses for the operation of its projects in the event that possible future changes in the bed of the Tennessee River or in the use of riparian lands create an effect on "downstream navigability." If petitioner no longer makes this concession, its position must be that the Commission is powerless to exert any regulatory control over even the most intolerable impediment to navigation. If, on the other hand, petitioner still concedes that the Commission can require a license on the basis of changes in the underlying facts, petitioner thereby dilutes its argument that Congress meant to create an indefeasible right to be free from federal regulation on the basis of an initial negative finding by the Commission under Section 23(b). Petitioner might argue that, although the Commission can reopen the licensing question under Section 4(g) on the basis of changes in facts, it cannot do so in order to apply subsequent interpretations of the statute. It is at least a partial answer to this argument that the Commission must apply the law as it stands at the time of the proceedings and not some earlier interpretation that has been superseded. The full refutation is, of course, that the Commission is not estopped from correcting mistakes of law. See *Automobile Club of Michigan* v. *Commissioner*, 353 U.S. 180, 183.

[3] Petitioner here, as in the court below, alleges that certain early statements made by the Commission or its officers assert that an initial Commission finding that a proposed project would not affect interstate commerce confers perpetual immunity from the licensing requirements of the Act. These statements were fully reviewed by the court below (Pet. App. 6a–9a,

> Unless the inference is unambiguous and compelling, a court would not be warranted in upholding a claim that Congress meant to create an indefeasible private right springing from an initial exercise of the Commission's regulatory authority, that would survive and remain immune from further regulation under any circumstances * * * [Pet. App. 16a].

2. Section 14 of the Federal Power Act provides that at the expiration of the license period the United States may take over any project on payment of the licensee's net investment; under Section 6 of the Act (16 U.S.C. 799), this "recapture" condition must be accepted by the licensee in order to obtain a license. Petitioner contends that to require it to obtain licenses which include the recapture provision would constitute a taking of property without just compensation, in violation of the Fifth Amendment, because net investment, as defined in Section 3(13) of the Act (16 U.S.C. 796(13)), is normally lower than fair market value. The court below properly held that this question was not ripe for decision. The application of the recapture provisions to petitioner's projects can arise only in the event that Congress decides to authorize and appropriate funds for recapture, and Congress may never make this decision.

12a–13a), and it is unnecessary to repeat here its demonstration that they do not support petitioner's conclusions. In fact, one of the orders relied on by petitioner expressly stated that changed circumstances could require future licensing of petitioner's project (Pet. App. 13a–14a). And, as the court noted, even if the Commission had taken a consistent view contrary to that now adopted, this could not preclude the Commission from exercising the actual powers delegated to it by the Congress (Pet. App. 9a, n. 12; *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 678, n. 5).

Petitioner's licenses, moreover, would not expire for a number of years, and it is impossible to predict with any degree of certainty at this time that fair value would exceed net investment at the time recapture proceedings might be instituted.[4] If and when the United States attempts to recapture any of these projects, petitioner will not be precluded from raising its constitutional question.

Contrary to petitioner's assertion, the decision of the court below is not in conflict with *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377 or *Rumford Falls Power Co.* v. *Federal Power Commission*, 355 F. 2d 683 (C.A. 1). In *Appalachian*, the United States sued to enjoin the construction of a project unless the developer secured a license or, in the alternative, to obtain an order for the removal of that part of the project which already had been constructed; the developer argued, *inter alia*, that the recapture provision of the license violated the Fifth Amendment. This Court's decision to reach the merits of the constitutional issue was based upon the exceptional circumstances of the case, and it does not

[4] The court also noted that the issue might become moot because "possible future changes in the bed of the Tennessee River, or its tributaries or the use of riparian lands, may create an effect on downstream navigability, and the developments may thereby become subject to what even Nantahala acknowledges as the government's limited right of recapture at less than fair value." (Pet. App. 22a–23a.) Indeed, this Court in *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, upheld the constitutionality of the recapture provisions of Section 14 in such context.

establish that the constitutionality of the recapture provision may always be raised at the time a license requirement is imposed. The court found that:

> [H]ere the requirements of § 14 so vitally *affect the establishment and financing* of respondent's project as to require a determination of their validity before finally adjudging the issue of injunction. [311 U.S. at 421; emphasis supplied.]

In the present case, on the other hand, petitioner's projects have been operating for more than ten years, and there is no allegation that the license conditions will jeopardize its financial position.

In *Rumford Falls,* a project owner challenged a condition in Commission's proposed license requiring the licensee to permit others to use its facilities on the grounds that the condition was ambiguous and beyond the Commission's authority. Judicial review prior to the owner's acceptance of the disputed condition was appropriate so that the owner could know what effect the condition might have on its operations and so that the Commission could clarify or revise the condition if it was held to be defective. The present case involves a condition which is not claimed to be ambiguous and which is imposed by statute and not as an exercise of the Commission's discretion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

RICHARD A. SOLOMON,
General Counsel,
PETER H. SCHIFF,
Solicitor,
DREXEL D. JOURNEY,
Assistant General Counsel,
ISRAEL CONVISSER,
DAVID F. STOVER,
Attorneys,
Federal Power Commission.

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